No. 625.

In the Supreme Court of the United States

OCTOBER TERM, 1946

PETER CALDAROLA, PETITIONER

v.

MOORE-McCORMACK LINES, INC., AND GERDA ECKERT AND THOR ECKERT, JR., PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF THOR ECKERT & CO.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States files this memorandum *amicus curiae* because of the importance of the problem presented in the operation of government-owned shipping, whether in peace or in war. The United States Maritime Commission has requested the Acting Solicitor General to advise the Court of the Government's interest and of its position respecting the issues involved.

INTRODUCTION

Petitioner was an employee of Jarka Corporation, a contracting stevedore, which was en-

gaged under a general contract with the War Shipping Administration (as representative of the United States) to stevedore the S. S. *Everagra* and other vessels owned and operated by the United States (R. 259). Respondent was a ships husband or general agent of the United States in the operation of the Government's fleet of cargo vessels employed under an agreement with the United States represented by the War Shipping Administration to act for it "as its agent and not as an independent contractor to manage and conduct the business of vessels assigned to it" (R. 362). Pursuant to the agency agreement the United States is, or may be, obligated to reimburse the general agent for money paid in resisting or settling claims arising out of duties performed under the agreement.[1]

In the circumstances of this case petitioner was entitled to recover from the owner of the vessel without proof of negligence by a suit in admiralty on the ground that the ship was unseaworthy due to the defective boom. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85. For the purposes of such a suit we believe that the United States would unquestionably be regarded as the owner of the vessel. See *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, 577, 579–582; *American Stevedores, Inc.* v.

[1] The United States procured protection and indemnity insurance covering risks of the character involved in the present case and respondent is represented by private counsel retained by the Government's P and I underwriters (R.).

Porello, No. 69 this Term, decided March 10, 1947.[2] In that proceeding petitioner also could have joined the respondent general agent as well as any other persons whom he might think to be liable, or could have filed separate libels and had all of the suits consolidated for trial (2 Benedict, Admiralty, 6th ed., pp. 93, 553). Instead, petitioner chose to sue respondent in the State courts where, although he could not join the United States, he could have his damages assessed by a jury. In such a proceeding, unless it could be established that respondent and not the United States was owner *pro hac vice* in possession and control of the vessel, it was necessary for petitioner to prove a negligent breach of a duty owing from respondent to himself.

The New York Court of Appeals held that the United States and not respondent was the owner in possession and control of the vessel. It further held that respondent general agent owed no duty to petitioner to make the vessel safe. The court

[2] Jurisdiction for such a suit would exist under the Suits in Admiralty Act, 1920 (46 U. S. C. 741 *et seq.*), if the vessel were employed as a merchant vessel; under the Public Vessels Act, 1925 (46 U. S. C. 781 *et seq.*), if employed as a public vessel. Standard forms of the contracts, charters, and insurance arrangements are contained in *Compilation of Standard Contract Forms of the War Shipping Administration*, compiled by the Merchant Marine and Fisheries Committee of the House of Representatives (Document No. 4, 1945). Article 8 of the general agency agreement, containing the provisions respecting insurance, was omitted in printing the record. It is found at pp. 331–332 of Document 4 and 46 C. F. R., 1943 Cum. Supp., p. 11429.

accordingly ordered petitioner's suit dismissed and it is to review that decision that this Court granted certiorari. The United States is vitally concerned as to whether itself or respondent is held to be owner *pro hac vice* in possession and control of the *Everagra*. The interests of the United States are not materially affected by the question of whether the duty owed by respondent to the United States to use due diligence to maintain the vessel in a safe and seaworthy condition should be held to extend also to the petitioner.

THE INTEREST OF THE UNITED STATES

In numerous situations it is of the greatest importance that the United States and not its general agents be held to be the owner in possession and control of its cargo vessels. If the general agent be held to be the owner *pro hac vice* in possession and control, the United States will be required to defend before juries in the state courts suits brought against its general agents on account of negligent navigation by the master and crew of its cargo vessels. In time of war such collisions commonly involve convoy and routing instructions, the details of swept channels and other harbor defense procedures, secret detection equipment and many other matters of the highest secrecy. During the war this Court by special admiralty rule provided for the impounding of pleadings and the hearing of cases *in camera* in order to protect the public interest in these re-

spects.[3] No such action could be effective in the case of cases tried before juries in the state courts.

If the general agent rather than the United States is owner *pro hac vice* in possession of government cargo vessels, the vessels are not entitled to enjoy the immunity of government vessels in foreign ports. Cf. *Mexico* v. *Hoffman*, 324 U. S. 30, 37–38; *The Navemar*, 303 U. S. 68, 74. Although the United States recognizes civil responsibility for such vessels, it does not waive their sovereign immunity. See 46 U. S. C. 747. Likewise, in this country, the vessels would not be entitled to immunity from regulation and taxation by local governments in cases where vessels privately owned and possessed are subjected to such regulation and taxation.

The last consideration is particularly significant in connection with the question of the liability of the Government, through its general agents, for state unemployment insurance taxes. Congress has made special statutory provision for old age and survivors' insurance benefits[5] and for unemployment compensation insurance benefits[6] for seamen employed by its general agents

[3] General Admiralty Rule 46 as amended June 8, 1942 (316 U. S. 717). Such risks are not insured by the Government and the defense must be conducted by attorneys of the Department of Justice.

[4] War Shipping Administration (Clarification) Act of March 24, 1943, c. 26, 57 Stat. 45, as amended (50 U. S. C. App., Supp. V, 1291; 26 U. S. C., Supp. V, 1426 (i); 42 U. S. C., Supp. V, 409 (o)).

[5] Social Security Act Amendments of August 10, 1946, c. 951, P. L. 719, 79th Cong., 2d Sess.

on behalf of the War Shipping Administration. If it be held that the general agent and not the Government is owner *pro hac vicè* in possession and control of the Government's vessels, general agents will be required to collect additional taxes from seamen on government vessels and from the United States under the terms of the agency agreement and pay over the same to the state government having jurisdiction over the general agent. And all this without any corresponding benefit since Congress has made special provision for such cases.

ARGUMENT

I

THE GENERAL AGENT WAS NOT THE OWNER *PRO HAC VICE* IN POSSESSION AND CONTROL OF THE S. S. *EVERAGRA*

Consideration of the agreements and regulations of the War Shipping Administration and the applicable statutes of Congress makes it plain that respondent acting as general agent for the United States had no possession or control over the physical operation of the SS Everagra. It is made equally plain that respondent had no authority or control over the conduct of the master and crew in the management of the vessel and its equipment so as to be liable for their acts under the doctrine of *respondeat superior*. It follows that respondent cannot be held to have been the owner *pro hac vice*.

1. For many years the Government has been engaged in peace and in war in the operation of

a fleet of cargo vessels.[6] In conducting these operations the United States, like private shipowners, has made use of the two coordinate classes of agents for the conduct of the shipping business—the ship master and the ship's husband—each responsible directly to the United States as owner for the matters with which they are respectively entrusted and neither exercising control or authority over the other. It employs experienced ship masters as its agents for the physical operation and management of its vessels afloat and experienced steamship operators as ship's husbands or general agents for the business operation and fiscal and economic management of the affairs of its vessels ashore.

The masters employed by the United States to navigate and physically manage its vessels afloat are currently employed on the terms of the cus-

[6] The Merchant Marine Act, 1936, directs the United States Maritime Commission to arrange for the operation of its vessels by private steamship companies under bareboat charters. In such private operation the steamship companies are, of course, owners *pro hac vice* in possession and control of the vessels. In order to assure operation of lines in unprofitable trades, however, it is provided that if it should be impossible to find private operators willing to operate the vessels under bareboat charter, they may be temporarily operated by the Commission itself through such private operators and upon such operating agreements as the Commission shall find advantageous. (46 U. S. C. 1194, 1197 (*c*).) While the end of war-time conditions will result in the return of most vessels to private operation, it seems not impossible that the Government may for many years be required to operate lines in certain unprofitable trades.

tomary maritime usages and the general maritime law.[7] They accordingly have physical possession, custody and control of the vessels afloat as the direct representatives of the owner, the United States. The operators employed to husband the vessels ashore are designated "general agents." They are currently employed on terms substantially in accord with maritime custom[8] and fully described in the standard form of agency agreement designated "GAA–4–4–42" (R. 362–379). They are accordingly the channel through which instructions from the United States as owner (represented by War Shipping Administration) are relayed to the masters of the vessels whose business operations have been assigned to them.

The duties assigned to general agents respecting the vessels themselves make it abundantly plain that the United States has not conferred upon them the possession and control of the vessels. Nowhere in the agreement is there found any language amounting to a demise or delivery to the general agent of the physical possession and control of the vessels to be assigned to him. On the contrary the agreement makes it plain that the master as the direct agent of the United States is in exclusive possession of his ship.[9] And it is well

[7] See 2 Parsons, *Shipping* (1869), pp. 3–13; Bouvier, Law Dictionary (1934), "Master of a Ship."

[8] See 1 Parsons, *Shipping* (1869), pp. 109–114; Bouvier, Law Dictionary (1934), "Ship's Husband."

[9] As pointed out by the court below (R. 13) there is a striking difference in the standard form of general agency

established that where the general owner thus retains the possession, command and navigation of a vessel, the agreement does not constitute a demise, divesting the general owner and making the other party owner *pro hac vice*, and the entire legal responsibility of ownership remains in the general owner. *Reed* v. *United States*, 11 Wall. 591, 600; *United States* v. *Shea*, 152 U. S. 178; *Hagar* v. *Clark*, 78 N. Y. 45.

Respondent and other general agents are employed by the United States to husband its vessels

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agreement and the special form involved in *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, and *Quinn* v. *Southgate Nelson Corp.*, 121 F. 2d 190 (C. C. A. 2), certiorari denied, 314 U. S. 682, whereby the United States turned over the vessels themselves to be operated by a cost-plus contractor designated "Managing Agent" and the latter, and not the United States, manned the vessel with a master and crew employed as its own agents. That agreement (see Record in *Brady* v. *Roosevelt S. S. Co.*, (No. 269, October Term, 1942, pp. 21–32) stated, "The Managing Agent has indicated its willingness to undertake the management and operation of the Line, * * *. The Owner hereby designates the Managing Agent as its Managing Agent to manage, operate and conduct the business of the Line" (Art. 1); "The Managing Agent *shall manage and operate the said vessels* exclusively under the trade name American Pioneer Line" (Art. 4); "The Managing Agent agrees to *man, equip, victual, supply and operate* the vessels, subject to such restrictions and in such manner as the Owner may prescribe * * *. The Licensed Officers and Chief Steward, however, are to be subject to the approval of the Owner" (Art. 7); "The Owner may terminate this agreement * * * in case of * * * any assignment, transfer, agreement or arrangement whereby the *management or operation of the above described Line or vessels* shall be divested from the Managing Agent" (Art. 25).

under a standard form of general agency agreement "as its agent and not as an independent contractor to manage and conduct the business of vessels assigned to it" (Art. 1).[10] The general agent agrees to conduct the business of the vessels "for the United States, in accordance with such directions, orders, or regulations" as the United States may prescribe (Art. 2). The general agent undertakes to "maintain the vessel in such trade or service as the United States may direct" (Art. 3 A (a)); "equip, victual, supply and maintain vessels subject to such directions, orders, regulations and methods of supervision and instruction as the United States may from time to time prescribe" (Art. 3 A (c)); "arrange for the repair of vessels * * * including maintenance and voyage repairs and replacements" and "exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels" (Art. 14).

The provisions whereby general agents assume no personal responsibility and have no financial interest in the affairs of the vessels other than their fees confirm that the United States and not the agent is in exclusive control. Thus the agreement provides that general agents shall "issue or cause to be issued to shippers customary freight contracts and bills of lading" and "all bills of lading shall be issued by the general agent or its agents as agent for the master and the signature

[10] The standard form of agency agreement (GAA-4-4-42), 46 C. F. R., 1943 Cum. Supp., 11427 *et seq.* is set forth in the record at pp. 362–379.

clause may provide substantially that the general agent makes no warranty or representation as to the authority of the United States or the master to enter into the agreement, and that the general agent assumes no liability with respect to the goods described therein or the transportation thereof" (Art. 3 A (c)). The general agent undertakes to "collect all moneys due the United States under this agreement and deposit, remit, or disburse the same" in accordance with regulations to be prescribed by the United States (Art. 3 A (b)).

Because of the possibility that government shipments will so far exceed commercial cargo and passengers that the vessels may not earn expenses, it is provided that "The United States shall reimburse the General Agent * * * for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder, *excepting* general and administrative expense" (Art. 7). Moreover, "The United States shall, without cost or expense to the General Agent, procure or provide insurance against all insurable risks * * * and shall defend, indemnify and save harmless the General Agent against and from any and all loss, liability, damage and expense * * * on account of such risks and liabilities to the extent not covered by insurance" (Art. 8).[104]

[104] Article 8, omitted from the printed record, is published in Doc. 4 (*supra*, note 1), pp. 331–332; 46 C. F. R., 1943 Cum. Supp., p. 11429.

2. Further indicia of ownership and possession of the vessel by the United States are found both in the express language of the contract and the repeated statutory indications of Congressional intent that the master and crew should be regarded as the agents, servants and employees of the United States under the doctrine of *respondeat superior*. Of course this could not be the case if the general agent were held to be the owner *pro hac vice*. We recognize that the law is not bound to accept the terms in which parties describe their relationship. However, when one of the parties is the Government and there are clear and consistent administrative interpretations and legislative enactments accepting the description and legal incidents flowing therefrom, we submit that this Court should not adopt a contrary view.

The circumstance that the crew may be "employees" of the general agent within the technical meaning of that term in the Jones Act (see *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707) [11]

[11] In the *Hust* case a majority of this Court held that a seaman procured by a general agent for service as a member of the crew of a War Shipping Administration vessel is an employee of the procuring general agent within the meaning of the Jones Act. The majority did not decide whether in the circumstances the vessel, together with her master and crew, were so subject to the control of the general agent that the latter was responsible for their acts and the conditions aboard. A minority of the Court (Douglas and Black, JJ) thought the agent had sufficient control of the vessel to be treated as owner *pro hac vice*. 328 U. S. at 734. The

is not dispositive of the question of who their master is within the rule of *respondeat superior.*[12] It seems plain on the contrary that the United States and not the general agent is the master within the rule of *respondeat superior* and that the Government and not the general agent must answer to third parties for their negligent conduct. See Restatement, *Agency,* Sections 358, 405.

In accordance with the immemorial custom touching ships' husbands, it is made the duty of the general agent to procure the master and crew for the vessels assigned to him. But out of abundant caution it is expressly provided that when procured, "The master shall be an agent and employee of the United States and shall have

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minority recognized, however, that there was not a demise of the vessel to the agent (328 U. S. at 738). Demise has always been required to constitute one other than the general owner the owner *pro hac vice. United States* v. *Shea,* 152 U. S. 178, 187; *The Beaver,* 219 Fed. 139 (C. C. A. 9); Robinson, *Admiralty* (1939), pp. 594–596. An owner *pro hac vice* is exclusively responsible for the acts of the master and crew as their principal under the rule of *respondeat superior.* The general owner cannot be held liable. *The Del Norte,* 119 Fed. 118, 119 (C. C. A. 9); *Vitozi* v. *Balboa Shipping Co.,* 69 F. Supp. 286, 288 (D. Mass.); Robinson, *Admiralty* (1939), pp. 612, 614.

[12] See the majority opinion, 328 U. S. at 724, referring to *Labor Board* v. *Hearst Publications,* 322 U. S. 111, 129, where this Court indicated that in respect of remedial statutes (such as are the Labor Relations Act and the Jones Act), "technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants" are rejected in determining the scope of the term "employee".

and exercise full control, responsibility and authority with respect to the navigation and management of the vessel" and "the officers and members of the crew shall be subject only to the orders of the master" (Art. 3 A (d), R. 363). Masters so employed are accordingly the agents of the United States and not of the employing general agent, who "is no more responsible for their conduct to third persons or to the principal than he is for the conduct of other agents of the principal, unless he is negligent in their selection." See Restatement, *Agency*, Section 79, Comment a.

Congress, with the passage of the War Shipping Administration (Clarification) Act, 1943, has recognized the status of seamen serving on vessels owned by or bareboat chartered to the United States, through the War Shipping Administration, as employees of the United States. By that act Congress conferred upon them certain rights and benefits theretofore possessed by seamen employed by private ship operators but not enjoyed by those employed by the United States through general agents of the War Shipping Administration. Prior to the passage of that act, such seamen as employees of the United States were not engaged in employment covered by the Federal Insurance Contributions Act and were not entitled to benefits under the old age benefit provisions of the Social Security Act. The Clarification Act amended Section 1426 of the Internal Revenue Code (26 U. S. C., Supp. V, 1426 (i)) and

Section 209 of the Social Security Act (42 U. S. C., Supp. V, 409 (o)) so as to cover specifically under the definition of "employment" in those statutes the services performed by seamen employed on vessels owned by or bareboat chartered to the United States and operated by the War Shipping Administration through general agents. Without this action by Congress it was not possible for such seamen to enjoy the benefits which would have been theirs had they been employees of the general agent. The reports leave no doubt that the status of such crew members as employees of the United States was fully recognized.[13]

Prior to the adoption of the War Shipping Administration (Clarification) Act, 1943, *supra*, other government agencies recognized that such crew members were employees of the United States. For example, the United States Employees' Compensation Commission granted benefits to seamen of this class under the Employees' Compensation Act, 39 Stat. 742, 5 U. S. C. 751 *et seq.* See the Commission's 28th Annual Report (1944), p. 5. Similarly the authorities of most of the states which provide coverage for maritime workers in their unemployment compensation laws have refrained from attempting to collect contributions in respect of seamen on vessels operated by the War Shipping Admin-

[13] S. Rep. 62, 78th Cong., 1st Sess., pp. 5–6; H. Rep. 107, 78th Cong., 1st Sess., pp. 2, 15.

istration through general agents, since it is generally understood that such seamen are considered to be federal employees.[14]

Further Congressional recognition of the status of such crew members as employees of the United States is found in the provisions of the Social Security Act Amendments of August 10, 1946, c. 951, P. L. 719, 79th Cong., 2d Sess., which amended the Federal Employment Tax Act expressly to authorize the states to cover under their unemployment insurance laws services performed by seamen on interstate voyages. Several states, including California and New York, had already taken steps to cover such private seamen at least to the extent that their vessels operated from a single state. In order to permit all of the maritime states to join in an interstate agreement providing for the exchange of wage information between the unemployment insurance authorities of the several participating states as a basis for the payment of benefits to seamen serving on vessels operating out of more than one state, it was necessary to amend the federal act so as to authorize the states to cover seamen in the same manner as other employees. Such coverage expressly excluded members of the crews of vessels operated

[14] See *Issues in Social Security*, Report to the Ways and Means Committee of the House of Representatives by the Committee's Social Security Technical Staff pursuant to H. Res. 204, 79th Cong., 1st Sess., p. 401; Hearings before the House Ways and Means Committee on H. R. 3736, 79th Cong., 1st Sess., pp. 703–705.

by the War Shipping Administration through its general agents. Instead, Congress made specific provision for the payment of benefits to seamen formerly employed by the War Shipping Administration through general agents on vessels owned by or bareboat chartered to the War Shipping Administration and Maritime Commission.

This was accomplished by the addition to the Social Security Act of Title XIII (P. L. 719, c. 951, 79th Cong., 2d Sess., authorizing the Federal Security Administrator to enter into agreements with the several maritime states for the payment of benefits during a so-called reconversion period lasting until June 30, 1949. Under such agreements the states will pay compensation to the seamen as if they were in fact covered under the state law and obtain reimbursement thereof from the Federal Security Administrator. In the absence of such arrangements, the Federal Security Administrator is directed to make such payments directly to the applicant."[15] If it should be held that the general agent and not the United States is the owner *pro hac vice* in possession and control

[15] Payment of these benefits to seamen employed on vessels operated by the War Shipping Administration through general agents is made dependent upon appropriation by Congress for the purpose. At present a dispute exists between the federal authorities and those of the State of California respecting the right of the latter to treat War Shipping Administration seamen as employees of the general agent instead of the United States. In the circumstances no appropriation has been made.

of the vessel, the Government will be faced with the necessity of contributing through its general agents to such state funds retroactively for the entire period of the war, as well as prospectively.

II

THE LIABILITY OF THE GENERAL AGENT SHOULD DEPEND ON WHETHER HE HAS NEGLIGENTLY BREACHED HIS UNDERTAKING TO MAINTAIN THE SHIP

A holding that respondent was not in possession of the vessel nor the employer of the crew within the rule of *respondeat superior* is not incompatible with respondent's liability upon the record now before the Court. The question of liability should be decided on the narrow issue of whether whatever duty respondent owed to the United States to keep the ship in good repair also created a duty to petitioner.

We submit that respondent was under a contractual duty to the United States to exercise due diligence properly to maintain and repair the S. S. *Everagra*. This duty respondent violated if it failed to exercise due diligence to detect and cause to be repaired the defective boom alleged to have caused petitioner's injuries. Under its contract, respondent was not entitled simply to await reports from the *Everagra's* master and officers as to defective conditions aboard which required repairs. It was in exclusive charge of this aspect of the vessel's operation and it was its duty through its marine superintendent, port

captain and port engineer, or other shoreside personnel to make regular inspections to ascertain and discover such defects and have them promptly and properly repaired. The provisions of the general agency agreement and the regulations prescribed under Article 2 thereof make this abundantly plain. For the convenience of the Court they are authoritatively analyzed in a letter from the General Counsel of the Maritime Commission printed in the Appendix, pp. 24–33.

Respondent's duties in no way required that it interfere with the exclusive physical custody and possession of the ship's master as the direct representative of the United States in possession of the vessel. Under its agreement respondent, like every ship's husband, was entitled to go aboard to perform the duties of husbanding the vessel just as the Government's contracting stevedore, Jarka Corporation, was entitled as an implied term of its contract to go aboard to perform the duties of loading and unloading. Neither displaced the possession and control which the ship's master exercised for the United States.

Thus the question of the liability of respondent, as agent, for an independent tort growing out of its own negligence may be presented on the record here. In *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, this Court held that a Customs inspector injured as a result of similar defective maintenance of a government vessel was not prevented by the Suits in Admiralty Act from suing the agent for

the latter's independent tort. Whereas in the case at bar the Government's operating arrangements are such that the United States, through the ship's Master as its direct agent, mans the vessel, in the *Brady* case it was the duty of the steamship company to man as well as to maintain and supply the vessel. Nonetheless the Court expressly reserved the question as to whether in the circumstances of that case a cause of action had been established (317 U. S. at 585).[16] The question thus reserved confronts us here.

The court below appears to have decided the present case in reliance upon *Cullings* v. *Goetz,* 256 N. Y. 287, 290, holding that "Liability in tort is an incident to occupation or control." While that may be the local rule in New York, we do not think that it necessarily controls this case. From the decisions of this Court it seems clear that petitioner's right to recover depends on maritime law and not on New York law. *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 88; *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239, 243; *Intagliata* v. *Shipowners & Merchants Towboat Co.,* 26 Cal. 2d 365. A right sanctioned by the maritime law may be enforced in the state courts but nothing gives the complaining party "an election to de-

[16] It appears that there as here the injury resulted from the failure to repair defects in the vessel (in the *Brady* case a ladder) and that the agent, exactly as here, was exclusively responsible for the maintenance, supply and repair of the vessel. It did not appear whether or not the defects were discoverable by reasonable care in inspecting the vessel.

termine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law." *Chelentic* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 384; *Colonna Shipyard* v. *Bland*, 150 Va. 349, 358. If, as appears, this case is here as one of first impression under the law maritime, this Court may, as in other cases governed by federal law, resort to the customary materials of decision in fashioning a rule.[17]

An analogous situation is found in the case of managing agents who, while having neither possession nor physical control of property, have entire charge of its operation so as to be exclusively responsible for its maintenance. Such agents, known as "real estate management companies", have an implied license to enter and exercise the limited control necessary to make inspections and repairs. Their liability has been summarized in Section 387 of the American Law Institute, *Restatement of the Law of Torts*, as follows:

> An independent contractor or servant to whom the owner or possessor of land turns over the entire charge thereof is subject to the same liability for harm caused to others within or outside the land by his failure to exercise reasonable care to main-

[17] Compare *Board of Commissioners* v. *United States*, 308 U. S. 343, 349–351; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 367.

> tain the land in safe repair as though he were the possessor of the land.

And see Restatement, *Agency*, Section 354, Comments a, c, and d; 1 Mechem, *Agency* (2d ed., 1914), pp. 1086–1092.

The rationale of the rule is plain and would appear to be equally applicable here. If the agent binds himself by contract exclusively to inspect, maintain and repair the property, he creates the risk that his failure to perform his obligation will cause injury to innocent third parties. Consequently, the agent is under a duty to such parties to save them harmless from that risk. For the negligent breach of that duty the law imposes liability on the agent. *Dahms* v. *General Elevator Co.*, 214 Cal. 733; *Van Winkle* v. *American Steam Boiler Ins. Co.*, 52 N. J. L. 240; *Hudson* v. *Moonier*, 102 F. 2d 96, 99 (C. C. A. 8); *Murray* v. *Cowherd*, 148 Ky. 591. Restatement, *Torts*, Sections 404 and 395. See *Osborne* v. *Morgan*, 130 Mass. 102, a decision by Mr. Justice Gray, then Chief Justice of Massachusetts. Cf. 2 Am. Jur. *Agency*, Section 333, p. 262. We perceive no material difference between the duties of such an agent ashore and those of respondent here and believe that the same principles of law should govern questions of liability.[18]

[18] See *Murray* v. *American Export Lines*, 53 F. Supp. 861 (S. D. N. Y.); *Pedersen* v. *Stockard S. S. Corp.*, 268 App. Div. 992 (2d Dept.); *Pipitone* v. *Standard Fruit & S. S. Co.*, 270 App. Div. 844 (2d Dept.).

CONCLUSION

It is respectfully submitted that this Court should reject the contention that the general agent is the owner in possession of the vessel and the principal of the vessel's master and crew.

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MARCH 1947

APPENDIX

UNITED STATES MARITIME COMMISSION
WASHINGTON 25, D. C.

MARCH 24, 1947.

The Honorable GEORGE T. WASHINGTON,
Acting Solicitor General, Department of Justice, Washington 25, D. C.

SIR: This has reference to the request of your Department in connection with the case of *Caldarola* v. *Moore-McCormack Lines, Inc.*, et al. for a more specific statement of the views of the Maritime Commission in respect of the responsibility of general agents for the maintenance and repair of the vessels assigned to them.

The provisions of the General Agency Agreement and the Maintenance and Repair Regulations render unsound the contention of the respondent that War Shipping Administration bore the responsibility of inspecting the boom and determining the need for its repair or replacement because at the time of the injury to the appellant the vessel actually was undergoing repairs exceeding $29,000. That contention is not well founded for two reasons. First, because the determination of the maintenance repairs necessary was at all times the responsibility of the General Agent, whatever the cost of such repairs might be. Second, because the replacement or repair of a boom is an item involving less than

$10,000, and, therefore, if required, might have been accomplished by the General Agent during some voyage repair period prior to the one during which the accident occurred. Indeed, the General Agency Agreement and the Maintenance and Repair Regulations clearly establish that if the boom was defective it was the responsibility of the General Agent to have detected the defective boom and to have either remedied the defect itself, if within its ten thousand dollar authority, or to have advised War Shipping Administration of the necessity for such repair.

The position taken by the respondent general agent, if it should be adopted by the Supreme Court and reflected in its opinion, would have manifestly harmful consequences upon the settlement of the obligations of General Agents vis-a-vis War Shipping Administration—United States Maritime Commission. Moreover, the testimony of an employee of the New York office of the Maintenance and Repair Division of War Shipping Administration offered by the respondent (R. 168–183) does not correctly reflect the official position of this agency. There follows a discussion of the reasons for our position on this matter of the Agent's responsibility for repairs.

The respondent General Agent took the position in its requests to charge at the trial (R. 357–358) and reiterates in substance in its brief that:

> 13. The obligation to the United States of the defendants under the General Agency Agreement with respect to inspection of the vessel went no further under the evidence in this case than to receive information from the ship's officers as to

those parts of the vessel which needed repair, to verify such information, and to transmit said information to the United States of America.

* * * * *

15. These defendants as general agents had no obligation with respect to repairs of the vessel other than to arrange with some independent contractor to make said repairs when they were under $10,000 and the only repairs with respect to which such an obligation arose were those which were disclosed to the agents by the ship's officers.

16. There is nothing in the General Agency Agreement or regulations which obligated the defendants to make an independent inspection of the vessel to discover any defects which may have been overlooked by the officers of the vessel and omitted from the requisitions for repairs prepared by the officers.

The General Agency Agreement (GAA–4/4/42) between Thor Eckert & Co. and WSA provided in Article 3A that "to the best of its ability, the General Agent shall for the account of the United States: (R. 363) (c) equip, victual, supply and *maintain* the vessel, subject to such directions, orders, regulations and method of supervision and inspection as the United States may from time to time prescribe."

This clause is further amplified by Article 14 (R. 374) in which it was agreed that:

> The General Agent shall, unless otherwise instructed, *subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by*

the United States, arrange for the repair of the vessels, covering hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts, and including maintenance and voyage repairs and replacements, for the account of the United States, *as may be necessary to maintain the vessels in a thoroughly efficient state of repair and condition.* The General Agent shall exercise reasonable diligence in making *inspections and obtaining information with respect to the state of repair and condition* of the vessels, and so advise the United States from time to time, in order that the United States may satisfy itself that the vessels are being properly maintained, and shall cooperate with representatives of the United States in making any inspections or investigations that the United States may deem desirable.

The applicable "regulations, instructions or methods of supervision or inspection * * * required * * * by the United States" which were in effect at the time of the injury to the appellant (January 27, 1944) were, as follows: Maintenance and Repair Regulations No. 1 (Revised), effective August 20, 1942, (Plaintiff's Exhibit 8 (R. 383–388)) and Maintenance and Repair Regulations No. 3, effective November 15, 1943 (Excerpts from Plaintiff's Exhibit 6, p. 75). Maintenance and Repair Regulation 1 (Revised) provided in part, as follows (R. 385–386):

2. Repairs to be Ordered by General Agents:

In instances where vessels owned by, or under bareboat charter to, the United States and assigned to General Agents

under Service Agreements with the War Shipping Administration, require repairs (other than structural changes, arming, degaussing, defensing and installation of convoy operating measures) involving the expenditures of not more than $10,000.00 in respect to any one voyage, *the General Agents shall arrange for and order the performance of such repairs without prior written approval of the local manager, Maintenance and Repair Division.* However, General Agents shall promptly notify, and obtain written approval from, the local manager, Maintenance and Repair Division whenever it becomes apparent that actual expenditures will exceed the prescribed limitation of $10,000.00.

Subject to the foregoing, General Agents shall:

(a) *Determine the repairs necessary:*

* * * * *

(c) *Arrange* with the Local Manager for dry-docking and other surveys, and *for inspectors to view the work when the cost of repairs may exceed the prescribed limit:*

(d) Prepare and submit specifications in sufficient detail to describe fully the work to be performed, forwarding a copy to the Local Manager. Specifications must show the classification of the work, such as hull, engine, Steward's Department, insurance and improvements.

(e) Place in hand and award contracts for repairs.

(f) *Supervise to completion, irrespective of the amount to be expended,* all maintenance and insurance repairs including the requirements of the Classification Society and Bureau of Marine Inspection and

Navigation, and approved changes and improvements;

(g) Obtain completion certificates, signed by a representative of the General Agent, the Master or Chief Officer, and Chief Engineer, showing that the repairs have been completed.

* * * * * *

Section 3 of this Regulation provides in part as follows (R. 387–388):

Repairs to be ordered by the Maintenance and Repair Division.

Specifications are to be prepared, and contracts awarded, by the Maintenance and Repair Division, in accordance with basic (Master) contracts, or subject to the terms of a basic contract to be executed by the contractor by whom the repairs are to be made, in all instances involving the following categories:

(a) Repairs to vessels owned by, or under bareboat charter to, the United States and assigned to General Agents under Service Agreements with the War Shipping Administration, involving the expenditure of more than $10,000.00 in respect to any one voyage, *except in an instance where the General Agents arrange for and order the performance of such repairs on the basis of estimates indicating that their cost will not exceed $10,000.00 and it later develops that the actual expenditures exceed that limitation.*

Maintenance and Repair Regulations No. 3 provided in part as follows (Excerpts from Plaintiff's Exhibit No. 6, p. 75):

Part 2—Authorization for Future Awards of Work.

(a) In the future, General Agents shall award work subject to the provisions of Maintenance and Repair Regulations No. 1 (Revised) as amended by Supplement No. 1 thereto. If the holder of a Master contract is available to perform the work, such work must be awarded to such contractor subject to the terms of the Master contract. *The amount of work which a General Agent may award to a holder of a Master* (WARSHIPREP) *Contract without prior approval of the Division of Maintenance and Repair shall not exceed* $10,000 *in respect to any one voyage.* If no such holder of a Master Contract is available to perform the work, General Agents shall award the repairs on a Lump Sum (i. e. fixed price) basis on Form SMALREP attached hereto; work may be awarded by General Agents on a Lump Sum basis without prior approval of the Maintenance and Repair Division on Form SMALREP *only* in amounts not in excess of $1,000 to any one contractor. *Repairs of a separate and distinct character* (such as—radio repairs, compass repairs and adjustments, servicing of refrigeration machinery, etc.) *may be awarded under Form SMALREP, and subject to the limitations thereto, to various contractors specializing in the particular work necessary.* The aggregate of all contracts awarded by the General Agent will in no case exceed $10,000 in respect to any one voyage.

(b) *The attention of General Agents is directed to the provisions of the Service Agreement* (Form G, A. A.) *under which procuring of repairs, to the extent author-*

> *ized, is the responsibility of the General Agent.* Under the prescribed Lump Sum form of contract the price, agreed upon at the time of the award and based upon specifications submitted by the General Agent to the repair contractor, will be the amount payable. Any supplementary items due to changes (additions or cancellations) must be covered in separate specifications showing the price agreed upon for the additional work or the credit for work cancelled. In any case, the $1,000 limitation of the contract (SMALREP) must not be exceeded. Care should be taken in the negotiation of the price to be certain that the work is performed at a fair and reasonable amount.

The intention of the above quoted provisions of the General Agency Agreement and the Maintenance and Repair Regulations with which the General Agent respondent agree to comply was to place responsibility on the respondent, Eckert, "to maintain" the vessel; in the exercise of that responsibility it was required to determine the repairs necessary, with full power and authority to do all things necessary or desirable in order to ascertain the same including the power to survey and inspect the vessel; after determining the repairs necessary if the cost, actual or estimated, of such repairs was under $10,000 it had full power and authority to arrange for such repairs without securing any approval from any War Shipping Administration officials; that after determining the repairs necessary if the cost of such repairs was over $10,000 it had the duty of advising the War Shipping Administration's Maintenance and Repair Division of the nature of the repairs required but the preparation of the speci-

fications and the awarding of the contracts was then to be made by the Maintenance and Repair Division; in either event whether the contract was awarded by the agent or by War Shipping Administration's Maintenance and Repair Division, the Agent was required to supervise to completion all maintenance repairs irrespective of the amount involved. Insofar as repairs under $10,000 were concerned, payment for such repairs was also to be made by the General Agent out of the General Agent's Special Bank Account without any clearance by any War Shipping Administration officials. In this connection we might mention that *one* of the main reasons for having the Commission's Maintenance and Repair Division award the contract in the over $10,000 cases was to free the Agent of the responsibility for the payment of these repairs which ofttimes resulted in the expenditure of considerable sums of money. Payment of these sums by the agents would have required much more frequent replenishment of their accounts than was considered desirable.

The foregoing represents the position of the Maritime Commission on this matter and the testimony of any employee of the Maintenance and Repair Division, War Shipping Administration, New York (R. 181–183), to the extent it deviated from this position, can not be considered to be binding as the official position of War Shipping Administration. The Agent's statement of the scope and intent of the War Shipping Administration—Maritime Commission's Regulations and Orders does not properly represent and differs substantially from this Agency's interpretation and construction of its own Regulations

and Orders. We believe that the Court should be afforded the full benefit of this Agency's construction and interpretation with respect to any of the Orders and Regulations which may have bearing on the issues raised in this case.

Respectfully,

(Signed) W. H. Skinner,
WADE H. SKINNER,
General Counsel.

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SUPREME COURT OF THE UNITED STATES

No. 625.—October Term, 1946.

Peter Caldarola, Petitioner, *v.* Gerda Eckert and Thor Eckert, Jr., Partners Doing Business Under the Firm Name of Thor Eckert & Co.	On Writ of Certiorari to the Court of Appeals of the State of New York.

[June 23, 1947.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The S. S. Everagra is owned by the United States and managed in its behalf by the respondents as General Agents. (For the relevant portions of the contract and for full consideration of it in relation to issues other than those here involved, reference is made to *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707.) On January 27, 1944, the Everagra, docked in the North River, New York City, was being unloaded by a stevedoring concern, the Jarka Company. Jarka did the unloading under a contract with the United States, negotiated through the War Shipping Administration. One of its provisions was that "the Administrator shall furnish and maintain in good working order all" necessary equipment. Caldarola, the petitioner, was an employee of Jarka. In the course of his work on the vessel he was injured. He brought this action in the New York courts against the respondents, claiming that his injury was caused by a defective boom and that they were liable for failing in their duty as Agents to maintain it in sound condition.

The New York Court of Appeals, affirming the Appellate Division in setting aside a verdict for the petitioner, 270 App. Div. 563, held that under New York law the relation which the Agents bore to the vessel did not make them responsible to a third person for its condition. 295

N. Y. 466. Because of claimed conflict in the decisions, particularly between this ruling and *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, we granted certiorari. 329 U. S. 704.

No doubt petitioner could have sued the United States in Admiralty. Section 2 of the Suits in Admiralty Act, 41 Stat. 525, 46 U. S. C. § 742. He chose not to do so. Presumably to obtain the benefit of trial by jury, he asked for relief from New York. There is no question that the injury of which Caldarola complains is a maritime tort. As such it is suable in the State courts by virtue of § 9 of the Judiciary Act of 1789 which saves "to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." 1 Stat. 76–77. Whether Congress thereby recognized that there were common law rights in the States as to matters also cognizable in admiralty, or whether it was concerned only with "saving" to the States the power to use their courts to vindicate rights deriving from the maritime law to the extent that their common law remedies may be available, is a question on which the authorities do not speak with clarity. Compare *Waring* v. *Clarke*, 5 How. 441, 460–61; *Taylor* v. *Carryl*, 20 How. 583, 598–99; and 3 Story on the Constitution (1st ed.) 533, n. 3, with *Schoonmaker* v. *Gilmore*, 102 U. S. 118; *The Hamilton*, 207 U. S. 398; *Chelentis* v. *Lukenbach S. S. Co.*, 247 U. S. 372; *C. J. Hendry Co.* v. *Moore*, 318 U. S. 133; and *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 88–89. In any event, whether New York is the source of the right or merely affords the means for enforcing it, her determination is decisive that there is no remedy in its courts for such a business invitee against one who has no control and possession of premises. Compare *Douglas* v. *New York, New Haven & Hartford R. Co.*, 279 U. S. 377, and *Testa* v. *Katt*, 330 U. S. —.

The New York Court of Appeals authoritatively determines who is liable, in New York, for such an occurrence

as that of which Caldarola complains. Insofar as the issues in this case exclusively concern New York law, that court had the final say in holding that one in the relation of the respondents to the petitioner is not liable for the tort of which the latter complains. But to the extent that the determination of tort liability in New York is entangled with the construction of the contract between the Agents and the United States, the interpretation of that contract is a matter of federal concern and is not concluded by the meaning which the State court may find in it.

We agree that if, on a fair reading of the contract, the control which the Agents had over the vessel is the kind of control which New York requires as a basis of liability to third persons, the New York courts cannot so read the contract as to deny the right which it recognizes. It is not claimed that an injured party has rights under the agency contract or that it created duties to third persons. *Robins Drydock & Repair Co.* v. *Flint*, 275 U. S. 303. And so the narrow question is whether the Agents were in possession and control of the [redacted]. Everagra. This is the crucial issue, because liability in tort by the Agents for Caldarola's injury would only arise in New York when there is such possession and control of premises on which injury occurs, due to negligence in their maintenance. *Cullings* v. *Goetz*, 256 N. Y. 287. The United States, as *amicus curiae*, submitted what we deem to be conclusive considerations against reading the contract so as to find the Agents to be owners *pro hac vice* in possession and control of the vessel. The consequences, to both the national and international interests of the United States, of such a construction would be too far-reaching to warrant such a forced reading merely in order to have a basis on which to build liability under the [redacted] law of New York. Serious issues affecting the immunity of Government vessels in foreign ports as well as immunity from regulation and taxation by local governments

would needlessly be raised. After all, the question is not whether petitioner may be compensated for his injury. Congress has made provision for that. Petitioner insists, in order to enable him to sue in the courts of New York, that the Agents are to be deemed, as a matter of federal law, owners of the vessel *pro hac vice* and, therefore, as a matter of State law, subject to the duties of such ownership under New York law toward business invitees. We reject this construction.

Our previous decisions do not require it. *Hust* v. *Moore-McCormack Lines, supra*, arose under the Jones Act (Act of March 4, 1915, 38 Stat. 1185, as amended, June 5, 1920, 41 Stat. 1007). We there held that under the Agency contract the Agent was the "employer" of an injured seaman as that term is used in the Jones Act, and a seaman could therefore bring the statutory action against such an "employer." The Court did not hold that the Agency contract made the Agent for all practical purposes the owner of the vessel. It did not hold that it imposed upon him, as a matter of federal law, duties of care to third persons, more particularly to a stevedore under employment of a concern unloading the vessel pursuant to a contract with the United States. *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575, is likewise remote from the issues decisive of this case. It merely held that the Suits in Admiralty Act, by furnishing an *in personam* remedy against the United States, did not free the Agent from liability for his own torts. The *Brady* case did not reach the "different question" whether "a cause of action" against the Agent had been established. 317 U. S. at 585. That is the precise question here, and more particularly, whether the contract created a relationship from which, under New York law, liability as to business invitees followed.

Judgment affirmed.

SUPREME COURT OF THE UNITED STATES

No. 625.—October Term, 1946.

Peter Caldarola, Petitioner,
v.
Gerda Eckert and Thor Eckert, Jr., Partners Doing Business Under the Firm Name of Thor Eckert & Co.

On Writ of Certiorari to the Court of Appeals of the State of New York.

[June 23, 1947.]

Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Murphy concur, dissenting.

For the reasons stated in my separate opinion in *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, 734, I think that respondents were owners *pro hac vice* of the vessel since the business of managing and operating it was their business. They were, therefore, principals and liable to petitioner, a longshoreman who was injured while working on the deck of the vessel by reason of the breaking of a cargo boom, part of the ship's gear.

The Circuit Court of Appeals for the Second Circuit has reached the same result in a case decided since *Hust* v. *Moore-McCormack Lines*. In *Militano* v. *United States*, 156 F. 2d 599, that court held that the agent under the same form of operating agreement as we have here was owner *pro hac vice*. Swan, J., speaking for the court, said in reference to the *Hust* case, p. 602, "If the agent remains the employer sufficiently to be liable to members of the crew under the Jones Act, we think it cannot escape the duties of an owner pro hac vice in other respects. Thus it has the duty to furnish stevedores with a safe place to work, a duty which is analogous to that owed by a landowner to a business visitor."

The Court does not essay to answer that argument; nor does it address itself to the facts which I reviewed in the *Hust* case and which establish that the business of man-

aging and operating the vessel was the business of the agent. It avoids analysis of the actual arrangement by viewing with alarm the consequences to the Government of such a holding as applied in other situations. But we are here concerned with private rights which press for recognition. It is no answer to the legal argument on which those private rights rest that the Government might be inconvenienced if they were recognized. It is plain under this operating agreement that the United States is merely the underwriter of the financial risks of the venture while the private operator performs the managerial functions in the usual way. To call that government operation is to ignore the realities of the relationship. Whatever the consequences in other situations, it is shocking to find private operators getting immunity in this manner from their traditional liability for tort claims.

SUPREME COURT OF THE UNITED STATES

No. 625.—October Term, 1946.

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[June 23, 1947.]

Mr. Justice Rutledge, dissenting.

I agree with respondents' counsel and the Court that *Hust* v. *Moore-McCormack Lines*, [redacted] U. S. 707, does not rule this case. Nevertheless I cannot agree with the Court's view that either New York law or the so-called "agency contract," identical with that involved in the *Hust* case, immunizes respondents from the consequences of their negligence causing petitioner's injury.

The *Hust* case involved the rights of seamen, not of longshoremen.[1] Also it arose under the Jones Act, 46 U. S. C. § 688, whereas here liability is grounded upon maritime tort. And the *Hust* decision rested in part upon the effects of the so-called Clarification Act of 1943, 50 U. S. C. App. § 1291, which has no bearing in this case, since seamen are not involved.

The *Hust* decision flatly rejected the view that the events there in question[2] had been effective to strip the

[1] Congress and the President, in the legislative and executive action taken in connection with the Merchant Marine and pertinent in the *Hust* case, were concerned with the rights of seamen, not primarily or perhaps even incidentally with those of longshoremen.

[2] In the *Hust* case, after noting the disruptive consequences for seamen's long-settled rights flowing from the view that they had been reduced for assertion to the single remedy provided by the Suits in Admiralty Act, we said: "We may assume that Congress could authorize so vast a disturbance to settled rights by clear and unequiv-

seaman of his various preexisting remedies, replacing them with the single remedy of suit provided by the Suits in Admiralty Act.[3] 46 U. S. C. § 742. The necessary result was to preserve not merely the seaman's rights under the Jones Act but also his other preexisting ones.[4] For if the conjunction of events put forward in the *Hust* case as having made the Suits in Admiralty Act remedy the only one available to the seaman was thus effective, the Jones Act remedy as well as others was thereby excluded. And if it was not excluded, neither were those others long possessed by seamen.[5] The *Hust* decision was therefore not merely a construction of the Jones Act. That Act was simply a specific fulcrum for turning the broader issue presented.

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ocal command. It is not permissible to find one by implication. *Brady* v. *Roosevelt Co.*, *supra* [317 U. S. 575], at 580. Here the disruption, if it has occurred, has done so only as an implied result of the conjunction of the Suits in Admiralty Act's provisions with the Government's emergency action in taking over the shipping industry for war purposes." 328 U. S. at 722. No such intent, we said, could be found in any action of Congress, or of that body and the President, in exercising their powers to bring the industry under governmental control; or in the Suits in Admiralty Act or the Jones Act as applied to the relation created by the "agency" contract.

[3] See note 2.

[4] Confirmation of the conclusions summarized in note 2, *supra*, was found in the legislative history of the Clarification Act of 1943, 50 U. S. C. App. § 1291, and particularly in the provision for election of remedies given by § 1, as to injuries accruing on or after October 1, 1941, and before March 24, 1943, the Act's effective date. Opinion was expressly reserved as to the effect of that Act concerning injuries occurring after its effective date. 328 U. S. at 727.

[5] In the *Hust* case we said of the argument that the Suits in Admiralty Act remedy had become exclusively available for asserting seamen's rights that, with specified exceptions, "the various rights of seamen, enforceable by various proceedings in admiralty and at law, in state and federal courts, are swept into one hopper, the suit against the Government. . . ." 328 U. S. at 720.

But seamen's rights are not longshoremen's rights and the events combining to present the question concerning seamen's rights in the *Hust* case were not conclusive upon longshoremen's rights. This is true although in some instances longshoremen, through legislation or by virtue of their succession to seamen occasioned by the industry's evolution in some phases of ship and shore duty, have been held entitled to similar protections. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52. The question in this case therefore is not one necessarily governed by the same considerations as applied in the cases of seamen covered by the *Hust* decision.

But, as the Court recognizes, it is one of maritime tort, although longshoremen rather than seamen are involved; and is moreover "suable in the state courts by virtue of § 9 of the Judiciary Act of 1789, which saves 'to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.'" Notwithstanding the characterization as maritime tort, the Court skirts the question whether the source of the right is New York law or, on the contrary, is federal law for which New York, pursuant to § 9, merely supplies a means for enforcement. For in either event, it says, "New York's determination is decisive that there is no remedy in its courts for such a business invitee against one who has no control and possession of the premises."

From this conclusion I disagree. For, if the liability here is founded in federal law, as creating the maritime tort, then New York law has nothing to do with creating or nullifying the substantive right. Its sole function is to supply the remedy commanded by § 9 of the Judiciary Act. *Testa* v. *Katt*, 330 U. S. —. And in my judgment the liability here, since it arises from a maritime tort,

is a creature of federal law in its entirety, not of state law.* I therefore do not agree that any substantive issues in the case "exclusively concern New York law" or that in any respect that state's Court of Appeals "had the final say in holding that one in the relation of respondents to the petitioner is not liable for the tort of which the latter complains." I do not understand how the Court can leave open the question whether New York law has a hand in creating the right sued on or one only in supplying a forum and remedy, and at the same time can rely on New York law as having any part in creating the right or nullifying it, as it seems to do. The result does not simply entangle state law with federal law in the substantive phase of the case. It entangles hypothetically applicable state law in one phase with federal law in another.

Regarding the case, as I do, as being controlled in its substantive aspect altogether by federal law, I do not think that law requires or should permit the result the Court reaches. Regardless of whether the so-called "agency" contract makes the operating company an

* 28 U. S. C. § 371, derived from § 9 of the Judiciary Act of 1789, is a recognition by Congress that the states may exercise whatever jurisdiction the common law had concurrently with admiralty. See *Waring* v. *Clarke*, 5 How. 441, 460–461. However, since "It is not a remedy in the common-law courts, which is saved, but a common-law remedy," *The Moses Taylor*, 4 Wall. 411, 431, it has been held that where suit is brought under the saving clause the right to be enforced is that "recognized by the law of the sea." *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 384. "The general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common-law court." *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 259. The commentators recognize this to be the rule now, 1 Benedict on Admiralty (6th ed.) 53–55; Steinberg, Maritime Cases in Common-law Courts (1925) 3 Tex. L. Rev. 246; Mole and Wilson, A Study of Comparative Negligence (1932) 27 Corn. L. Q. 333, 353–355, though the matter seems not to have been decided prior to the *Chelentis* case. Cf. *The Hamilton*, 207 U. S. 398, 404.

"agent," an "owner pro hac vice," or technically something else in relation to the United States, the federal maritime law in my opinion well might hold responsible to an injured longshoreman one who has knowledge that such persons will come aboard and who undertakes to keep the vessel and its equipment in safe condition for their use.[7] More especially should such a rule apply when the person so undertaking is the only one constantly on board to observe the creation of hazardous risks in the vessel's daily routines and, in addition, has such a degree of control over their creation as the "agent" did here.

But, in any event, the same result should be reached on the basis of construction of the contract. Whether this is put upon the ground stated in the opinion of MR. JUSTICE DOUGLAS, that the "agent" became owner *pro hac vice*, or in the view of the contract taken in the *Hust* case, with reference to application of the Jones Act, is largely immaterial, perhaps only a matter of words.[8]

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[7] "One who does an act or carries on an activity upon land on behalf of the possessor thereof, is subject to the same liability, and enjoys the same immunity from liability, for bodily harm caused thereby to others within and outside the land as though he were the possessor of the land." Restatement, Torts, § 383.

"An agent who has the custody of land or chattels and who should realize that there is an undue risk that their condition will cause harm to the person, land, or chattels of others is subject to liability for such harm caused, during the continuance of his custody, by his failure to use care to take such reasonable precautions as he is authorized to take." Restatement, Agency, § 355.

[8] In that case, assuming that the agreement made Hust, the injured seaman, an employee of the United States for purposes of ultimate control, in spite of the meticulous character of the differences between it and the Maritime Commission's standard contract, we said: "But it does not follow from the fact that Hust was technically the Government's employee that he lost all remedies against the operating 'agent' for such injuries as he incurred. This case, like *National Labor Relations Board* v. *Hearst Publications*, 322 U. S.

That view, incorporating the rule of the *Hearst* case,[9] we have only recently extended to apply in cases of coverage of the Social Security Act and the Fair Labor Standards Act. *United States* v. *Silk*, 331 U. S. —; *Harrison* v. *Greyvan Lines, id.*; *Rutherford Food Corp.* v. *McComb*, 331 U. S. —. While the liability here is not legislative in origin, nevertheless as in the *Hust* case, application of the common-law "control" test to defeat the longshoreman's remedy under the state procedure, as provided by § 9 of the Judiciary Act of 1789, cannot "be justified in this temporary situation unless by inversion of that wisdom which teaches that 'the letter killeth, but the spirit giveth life.'" 328 U. S. at 725.

Finally, in my opinion, the terms of the agreement in its provisions for indemnity confirm the conclusion that liability of the "agent" in such a case as this was contemplated. Not only is there broad indemnity "for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder," with specified exceptions not covering such liabilities as are now in question. The indemnity also expressly provided:

> "To the extent not recovered from insurance, the United States shall also reimburse the General Agent for all crew expenditures (accruing during the term hereof) in connection with the vessels hereunder, including, without limitation, all disbursements for or on account of wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss or personal effects, maintenance, cure,

111, involves something more than mere application to the facts of the common-law test for ascertaining the vicarious responsibilities of a private employer for tortious conduct of an employee." 328 U. S. at 724.

[9] *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111.

> vacation allowances, *damages or compensation for death or personal injury or illness,* and insurance premiums, required to be paid by law, custom, or by the terms of the ship's articles or labor agreements . . ." (Emphasis added.)

as well as for payments made to pension funds and for social security taxes. This clause specifically contemplated that the "agent" should be responsible for paying claims not only for maintenance and cure but also for "damages or compensation for death or personal injury or illness," and should be indemnified for such payment. A narrow construction, of course, would limit the provisions for payment and indemnity to payments made without resort to suit. On the other hand, even a literal interpretation would cover payments made by the "agent" upon judgments recovered against it on claims of the character specified. I know of no good reason why the narrow view should be accepted or why the Government by its contract should desire to uproot seamen and others, including longshoremen insofar as they have acquired seamen's rights aboard ship, from their normally applicable remedies, in the absence of either explicit statutory command or express contractual provision to that effect. Moreover, in view of the scope of the indemnity provided, I see no possible harm that could be inflicted on the "agent" from interpreting the contract so as to allow the normally applicable remedies to apply.

Accordingly, I would reverse the judgment of the Court of Appeals.